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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 JEFFREY R. NOWAK,

14 Defendant.
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Case No. 2:13-cr-00132-LDG (VCF)

ORDER

16 The defendant, Jeffrey R. Nowak, moves for a new trial pursuant to Rule 33 of the
17 Federal Rules of Criminal Procedure (ECF No. 178), which motion the Government
18 opposes (ECF No. 184).

19 Nowak argues that the government first disclosed, at his sentencing, that it had
20 forgiven the 2006 tax liability of Ramzi Suliman, a co-defendant who testified against him,
21 as part of Suliman's plea agreement. He asserts that this evidence was material to (but not
22 merely impeaching of) Suliman's credibility. The Court disagrees that the government's
23 disclosure—that the calculation of the amount Suliman owed as restitution did not include
24 Suliman's tax liability for 2006—is newly discovered evidence that is material and would, if
25 introduced at a new trial, probably result in Nowak's acquittal. Accordingly, the Court will
26 deny the motion.

1 Background

2 In April 2013, the government indicted Nowak and Suliman for conspiring to defraud
3 the United States by evading federal income taxes. As estimated in the indictment, Nowak
4 owed additional taxes in the amount of \$569,013 for the 2006-2009 tax years and Suliman
5 owed additional taxes of \$606,169 for the same period.

6 In 2014, Suliman entered into a plea agreement and pled guilty. Pursuant to the
7 plea agreement, Suliman agreed “to make full restitution in the amount of \$428,003.” The
8 parties also agreed that “[t]he Plea Agreement sets forth the parties’ agreement regarding
9 criminal charges referenced in the Plea Agreement and applicable sentences, fines and
10 restitution. It does not control or prohibit the United States or any agency or third party
11 from seeking any other civil or administrative remedies directly or indirectly against the
12 defendant.”

13 Suliman testified as a government witness against Nowak at Nowak’s trial in August
14 2016. During cross-examination by Nowak, Suliman testified as follows:

15 Q: Now, in your Plea Agreement, what was the amount of tax that you were
16 supposed to pay to the Internal Revenue Service?

17 A: Uh . . . the amount of . . . I owe?

18 Q: Correct.

19 A: I think it was 600 something based on the numbers they had. But then I had
20 to pay with the plea bargain, you know. There was 428,000 I had to pay and I
21 paid it.

22 Q: So the Indictment said Ramzi Sulliman owes over \$600,000 but the Plea
23 Agreement says you only have to pay 428,000; is that correct?

24 A: I think they waived –

25 A: . . .
26 they waived the penalties and stuff.

27 Q: . . .
28 And if you could explain that again to the members of the jury. The
29 indictment said you owed over \$600,000, yet you got a bargain of 428 on the
30 Indictment. Can you explain that to us?

1 A: Well, what I understand from the way my lawyer explained it to me, it was like
2 waiving some of these tax penalties and I don't know, interest and stuff like
3 that, I guess. So they came up with the amounts, you know. So I thought it's
okay, you know, I can – I have a loan against my stuff and then paid it off.

4 Q: So, it was 200 – over 200,000 less than what you were charged with?

5 A: Not over 200,000. It's 600 something. 602 or something. I paid 428. So it's
less than 200,000, yeah.

6 Q: So you got a pretty good deal, didn't you, Mr. Suliman?

7 A: Well, I – I – I wanted to pay whatever they – just to reach – to reach the plea
8 bargain. That's what I – I wanted to pay anything they want. But they came
up with this number; I was happy with it.

9 Prior to Nowak's sentencing, the parties agreed that the government established, at
10 Nowak's trial, that he owed \$421,206 in additional taxes for the years 2006-2009. The
11 parties also agreed that Suliman owed \$469,879 in additional taxes for the years 2006-
12 2009. Accordingly, the tax loss caused by the conspiracy for which Nowak was convicted
13 was \$891,085.

14 During the sentencing, counsel for the government explained the \$41,876 difference
15 between the additional taxes owed by Suliman (\$469,879) and the amount (\$428,003) that
16 Suliman and the government had agreed–in Suliman's Plea Agreement–that Suliman
17 would pay as full restitution:

18 I actually negotiated the underlying Plea Agreement with Suliman, I
19 was the only person in this room who was in that room. The negotiation was
20 to not include the loss attributable to his 2006 taxes in his restitution payment
and part of that decision was, as you heard at trial, he was not actively
involved in the conspiracy for 2006.

21 Analysis

22 "A new trial is not warranted under Rule 33 unless a defendant can establish five
23 elements: '(1) the evidence is newly discovered; (2) the defendant was diligent in seeking
24 the evidence; (3) the evidence is material to the issues at trial; (4) the evidence is not (a)
25 cumulative or (b) merely impeaching; and (5) the evidence indicates the defendant would
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1 probably be acquitted in a new trial.” United States v. King, 735 F.3d 1098, 1108 (9th Cir.
2 2013) (*citing United States v. Berry*, 624 F.3d 1031, 1042 (9th Cir.2010)).

3 The Newly Discovered Evidence

4 Nowak argues that the newly discovered evidence is that the government agreed to
5 forgive Suliman’s tax liability for the year 2006. He first discovered this evidence when the
6 government revealed it at his sentencing (and thus after his trial). Nowak’s argument rests
7 upon a mischaracterization of the government’s statement, at his sentencing hearing,
8 regarding Suliman’s restitution obligation under the Plea Agreement. The government did
9 not state that it had forgiven Suliman’s 2006 tax liability. Rather, and more accurately, the
10 government stated that the plea negotiation resulted in an agreement to not include
11 Suliman’s tax liability for the year 2006 in calculating the restitution that Suliman would owe
12 pursuant to the Plea Agreement.

13 As noted previously, Suliman and the government agreed that Suliman would pay
14 \$428,003 as “full restitution.” Nowak and the government agree that Suliman’s tax liability
15 for 2006 was \$41,876. Accordingly, the “evidence” disclosed by the government’s
16 statement at Nowak’s sentencing was that Suliman’s restitution obligation under the Plea
17 Agreement was \$41,876 less than the taxes he actually owed to the government. That the
18 “full restitution” obligation was less than the taxes owed did not, however, amount to a
19 forgiveness or waiver of Suliman’s outstanding \$41,876 tax obligation. Suliman and the
20 government also agreed, in the Plea Agreement, that other government agencies could
21 pursue civil and administrative remedies against Suliman. In practical terms, the IRS
22 retained the right to pursue Suliman’s tax obligations that remained outstanding after his
23 restitution payments. Accordingly, and at most, the government disclosed at sentencing
24 that it had agreed to accept, as full restitution from Suliman, an amount of money that was
25 less than the taxes he actually owed. Stated conversely, Suliman received the “benefit” of
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1 owing “full restitution” in an amount less than the taxes he actually owed, but did not
2 receive the “benefit” of having the difference waived or forgiven by the government.

3 The Defendant’s Diligence in Seeking the Evidence

4 The defendant argues that, as neither he nor his counsel were present during the
5 negotiations between the government and Suliman, no amount of diligence would have
6 permitted him to discover what occurred during the negotiations. The argument is
7 irrelevant. At issue is not what occurred during negotiations, but whether the defendant
8 was diligent in seeking evidence that the amount of restitution the government agreed to
9 accept from Suliman as “full restitution” (about \$428,000) was less than the taxes Suliman
10 actually owed (about \$469,000). Because Nowak was fully aware of the amount of
11 restitution the government agreed to accept from Suliman as “full restitution,” the relevant
12 inquiry regarding Nowak’s diligence is whether he was diligent in seeking evidence of
13 Suliman’s actual tax obligation.

14 Nowak contends that, in criminal tax cases, determining an individual’s actual tax
15 liability remains in flux through the end of trial. As such, performing the numerous
16 calculations to determine the taxes Suliman actually owed would have been an impossible
17 task.

18 While Nowak argues that the task of calculating the actual taxes owed by Suliman
19 would have been impossible, he has not offered any evidence either that the government
20 did not disclose the information necessary for the calculation, or that he actually engaged
21 in an effort to calculate the taxes that Suliman actually owed. Rather, he has only offered
22 his unsupported argument that it would have been impossible for him to determine
23 Suliman’s actual tax owed. Conversely, the government notes that it met its discovery
24 obligation by fully disclosing its calculation of Suliman’s individual tax liability for the years
25 2006-2009. While Nowak argues that the amount of a person’s tax liability remains in flux
26 through the end of the trial, he has not offered any evidence that the government’s

1 calculation of Suliman's tax liability changed subsequent to Suliman's Plea Agreement.
2 Accordingly, Nowak has not shown that he acted diligently in seeking evidence that the
3 amount of restitution paid by Suliman under his Plea Agreement was less than the taxes
4 that the government calculated he actually owed, and that the difference was about
5 \$41,000.

6 Materiality, Merely Impeaching, and Probability of Acquittal in a New Trial

7 Even assuming that the government's agreement—to accept "full restitution" from
8 Suliman in an amount less than the taxes he owed—constituted "newly discovered
9 evidence," and assuming Nowak had been diligent in seeking this evidence, the evidence
10 is not material but is merely impeaching, and would not probably result in an acquittal in a
11 new trial.

12 Given the circumstances of this motion and Nowak's prior trial, the factors of
13 whether the new evidence is material, is not merely impeaching, and would probably result
14 in a new trial are strongly intertwined. During his trial, Nowak cross-examined Suliman
15 regarding the government's agreement to accept, from Suliman, about \$428,000 as "full
16 restitution" as part of the Plea Agreement. The evidence was impeaching because it
17 concerned a benefit that Suliman, who was testifying for the government, had received
18 from the government. Specifically, the government had agreed to accept, as full restitution,
19 an amount of money that was about \$175,000 less than the \$606,169 that the government
20 had alleged, in the indictment, that Suliman owed as taxes for the years 2006-2009. The
21 evidence underlying the present motion is of a similar impeaching nature: it also concerns
22 the benefit Suliman received as a result of the government's agreement to accept
23 \$428,000 as full restitution. The distinction between the evidence offered at the first trial
24 and the "newly discovered evidence" is that the "newly discovered evidence" establishes
25 that the benefit to Suliman was that the government agreed to accept, as full restitution, an
26 amount of money that was about \$41,000 less than the \$469,879 that the government had

1 calculated he actually owed as taxes for the years 2006-2009. Accordingly, whether a new
2 trial is warranted requires consideration of that distinction between the evidence of the
3 benefit to Suliman that was presented to the jury at Nowak's trial, and the evidence of that
4 benefit that would be proffered at a new trial.

5 In cross-examining Suliman, Nowak sought to establish the benefit Suliman received
6 from the government by referencing the difference between the taxes the government had
7 alleged were owed by Suliman in the Indictment and the restitution amount the government
8 agreed to accept. In answering Nowak's questions, Suliman did not testify that most of the
9 difference (about \$135,000) between the amount alleged in the indictment and the amount
10 of restitution was because the government had calculated that Suliman's actual tax liability
11 was about \$469,000 rather than \$606,000. Rather, Suliman's answers instead left the jury
12 with the impression that the entire difference (more than \$175,000) was due to a waiver of
13 penalties and interest and other "stuff." While Nowak points out that Suliman's answers
14 were inaccurate because he attributed the difference to the government's waiver of
15 penalties and interest, he overlooks that Suliman's answer was also inaccurate as to the
16 value of the benefit (\$175,000 rather than \$41,000). Whether intended by Nowak or not,
17 the "evidence" conveyed to the jury by Suliman's answers was that he had received a
18 "pretty good deal" because the government agreed to waive collection of more than
19 \$175,000 from him. Despite this impeachment of Suliman, the jury nevertheless
20 determined that Nowak was guilty. Accordingly, the inaccurate "evidence" that the
21 government had waived collection of more than \$175,000 owed by Suliman amounted to
22 merely impeaching evidence, rather than materially impeaching evidence.

23 The impeaching nature of the evidence underlying Nowak's present motion is less
24 compelling than the result of the cross-examination. Though the evidence presented to the
25 jury during the cross-examination was inaccurate, the inaccuracy inured to the defendant's
26 benefit. The accurate testimony, which is the evidence at issue in this motion, would have

1 been that, in agreeing to accept \$428,000 as full restitution, the government decided to not
2 include Suliman's 2006 tax liability in the restitution calculation (without waiving the
3 government's right to civilly pursue the 2006 tax liability). It is this accurate testimony that
4 Nowak would be offering at a new trial to impeach Suliman: that the government agreed to
5 not include \$41,000 in a restitution calculation. As impeachment evidence, this accurate
6 evidence of the benefit Suliman actually received is less compelling than the inaccurate
7 testimony regarding that benefit that Nowak elicited from Suliman during his cross-
8 examination.

9 Nowak argues that, at his trial, the government made no effort to correct Suliman's
10 inaccurate testimony that the government waived only penalties and interest and failed to
11 properly instruct the jury that it had forgiven \$41,000 in taxes. The argument fails, at the
12 outset, because the government did not forgive \$41,000 in taxes, but rather agreed to not
13 include the 2006 taxes in calculating restitution (without waiving the right to civilly collect
14 the taxes). However, even assuming the government had forgiven the \$41,000 in taxes,
15 the Court disagrees that the legal basis for Suliman's debt to the government is significant.
16 Regardless of whether the government waived penalties or interest on unpaid taxes, or
17 instead forgave some of the underlying unpaid taxes, Nowak's jury received evidence
18 (albeit incorrect) that the value of this benefit to Suliman exceeded \$175,000 rather than
19 evidence that the value of the benefit to Suliman was about \$41,000. The government's
20 failure to correct Suliman's inaccurate testimony was to Nowak's benefit. As such,
21 presenting the accurate, but less damaging, evidence at a new trial would not probably
22 result in an acquittal.

23 Accordingly, even if newly discovered and diligently sought by the defendant, the
24 government's agreement to accept \$428,000 as "full restitution" from Suliman when it had
25 determined that Suliman owed \$469,000 in taxes (while preserving the right to civilly collect
26 the \$41,000 difference), is not material evidence, but is merely impeaching evidence, and

1 would not, if presented at a new trial to impeach Suliman, probably result in Nowak's
2 acquittal. Accordingly,

3 THE COURT **ORDERS** that defendant Jeffrey Nowak's Motion for New Trial (ECF
4 No. 178) is DENIED.

5 DATED this 1 day of September, 2017.


Lloyd D. George
United States District Judge